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NOTES.

ESTATES BY ENTIRETIES AND THE MARRIED WOMEN'S ACTS.—The old books, for the most part, find the origin of this tenancy in the legal unity of husband and wife.[1] If this means their consequent incapacity to hold by moieties,[2] it seems impossible to explain how husband and wife were able to continue to sustain the relationship of tenants in common in lands acquired before marriage.[3] Moreover, there is classical authority for the statement that proper words in a conveyance to a married pair would vest a tenancy in common or a joint estate.[4] It may well be, therefore, that the presumed intention of the grantor that they should so take and not their incapacity to

[1]Lit. Ten. § 291; 2 Cru. Dig. 508; 2 Bl. Comm. 182. Accordingly, a joint conveyance to husband and wife and a third party vests one moiety in husband and wife and the other in the third party. Co. Lit. 187; see *In re* March (1884) L. R. 27 Ch. Div. 166.

[2]Stuckey *v.* Keefe's Exr's. (Pa. 1856) 2 Cas. 397.

[3]Co. Lit. 187-*b*; Holt *v.* Wilson (1883) 75 Ala. 58; *cf.* 2 Plow. 482. It has been argued as a corollary that divorce will not change a tenancy by entireties into a tenancy in common. Alles *v.* Lyon (1907) 216 Pa. 604. The weight of authority, however, is *contra.* Ames *v.* Norman (Tenn. 1857) 2 Sneed 683.

[4]Preston, Estates, 132.

take otherwise controlled the vesting of the estate by entireties.[5] Historical explanation of this might be found in the ancient Teutonic recognition of the wife's individuality,[6] in which atmosphere a real joint ownership and control of husband and wife grew up, the joint control being later destroyed by the wife's common law disability during coverture,[7] but the joint ownership remaining, though the wife's participation was submerged.

At any rate, this closely restricted form of tenancy established itself firmly in the feudal hierarchy of concurrent seisins and has withstood the statutory assaults that have threatened, if they have not purposely attacked, its existence. In some jurisdictions indeed, it has succumbed to the married women's property acts which, when broadly interpreted, have been held to make impossible the creation of the estate by entireties,[8] on the ground that the whole proprietary status of coverture has fallen.[9] These acts, however, have been very generally construed as not affecting the old formulae prescribing how and what estates shall vest, but only as emancipating the wife to the full control of that which, by those formulae, she may in any instance have acquired.[10] The enjoyment and not the acquisition of her estate was said to be the subject of the legislation.

Now so long as the wife's disability existed, it mattered little just what her interest was; for her husband, seized both in his own right and in hers, had sole control during coverture,[11] though of course no conveyance by him was allowed to infringe upon the indefeasible right of survivorship.[12] But, under the enabling acts, if each is to have the enjoyment of his or her share, it becomes necessary to analyze the duality and to disentangle the separate interests. In this analysis the courts have reached diverse conclusions, one of which is represented by the recent case of *Bartkowaik* v. *Sampson et al.* (1911) 133 N. Y. Supp. 401, in which it was adjudicated that a husband, though he may not compel partition nor affect the right of survivorship, may nevertheless alienate his share of the estate for the period of coverture. To reach this result he must be conceived of as seized of a moiety.[13] Yet, in essential principle, this estate knew nothing of moieties,[14] and

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[5]Challis, Real Property (3rd ed.) 378. This is certainly the accepted modern doctrine. Minor *v.* Brown (1892) 133 N. Y. 308; McDermott *v.* French (1862) 15 N. J. Eq. 78.

[6]Putnam, Estates by Entireties, 4 So. L. Rev. 91.

[7]Hiles *v.* Fisher (1895) 144 N. Y. 306.

[8]Clark *v.* Clark (1875) 56 N. H. 105; Cooper *v.* Cooper (1875) 76 Ill. 57; see 20 Alb. L. J. 346. In Hoffman *v.* Stigers (1869) 28 Ia. 302, it is held that the estate by entireties still exists, but that the presumption of the common law is reversed and that express words are necessary to create it.

[9]Walthall *v.* Goree (1860) 36 Ala. 728.

[10]Bertles *v.* Nunan (1883) 92 N. Y. 152; Buttlar *v.* Rosenblath (1887) 42 N. J. Eq. 651; Diver *v.* Diver (1867) 56 Pa. 106.

[11]Barber *v.* Harris (N. Y. 1836) 15 Wend. 615; Ames *v.* Norman *supra.*

[12]2 Bl. Comm. 182; 1 Co. Lit. 187-*b*; Doe *v.* Parratt (1794) 5 T. R. 652, 654; Bate *v.* Seely (1863) 46 Pa. 248.

[13]Hiles *v.* Fisher *supra;* Vunk *v.* Raritan River R. R. Co. (1894) 56 N. J. 395.

[14]Chandler *v.* Cheney (1871) 37 Ind. 391.

it seems illogical to add a tenancy in common for the period of coverture to an indefeasible right of survivorship and call the sum an estate by entireties. This cannot be the operation of the enabling acts upon an estate described as held *per tout,* with the negative re-iteration, *et non per my.* On the other hand, in the effort to save the logical integrity of the estate, it has been decided that the married women's acts had no effect at all,[15] and that after their enactment, as before, the husband had control of the entire *res* with power to convey it for the period of coverture.[16] This is supported by discovering a legislative intent to except this estate from that general effect of the enabling acts which has given married women effective control of the interests which they had at common law.[17] A third doctrine avoids the objections to both of the above views. It does not profess to find a tenancy in common where on principle one should not exist, nor does it fail to respond to the liberal spirit of the statutes of emancipation.[18] By this theory, no part of the estate can be conveyed for any period except by joint deed of husband and wife, nor is it subject to the debts of either one alone.[19] It is controlled by him and her in true joint unity, such a unity as, it is suggested above, may have been exhibited in very early times. This last solution seems consonant with sound reason and with that public policy which safeguards home property from the vagaries of either spouse.[20]

IMPUTED NEGLIGENCE BETWEEN FELLOW SERVANTS.—It is a familiar principle that the concurrent negligence of one other than the defendant is no defense to an action against him by the injured party, if the latter was himself without fault.[1] Under the theory of imputed negligence, however, the principle admits of an exception, if the relation between the plaintiff and the negligent third person was such that the former must be deemed to have been guilty of contributory negligence. The harshness of such a doctrine whereby an innocent plaintiff is left without means of redress against an admitted tort feasor is apparent, and necessarily forbids its extension beyond the clearest cases.[2] Indeed, its invocation is justifiable only where some form of agency existed between the parties at the time of the injury complained of, to the extent that the plaintiff would have been responsible for the tortious acts of the third person.[3] The whole doctrine therefore, is but the converse of the time honored rule of *respondeat superior,* and can

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[15]Robinson *v.* Eagle (1874) 29 Ark. 202.

[16]Hall *v.* Stephens (1877) 65 Mo. 670; Bennett *v.* Child (1865) 19 Wis. 383.

[17]Pray *v.* Stebbins (1886) 141 Mass. 219.

[18]McCurdy *v.* Canning (1870) 64 Pa. 39; Naylor *v.* Minock (1893) 96 Mich. 182.

[19]Davis *v.* Clark (1866) 26 Ind. 424; Vinton *v.* Beamer (1885) 55 Mich. 559.

[20]Chandler *v.* Cheney *supra.*

[1]Beach, Contributory Negligence (3rd ed.) §§ 100, 101, 102.

[2]Robinson *v.* New York etc. R. R. (1896) 66 N. Y. 11.

[3]Shultz *v.* Old Colony R. R. (1907) 193 Mass. 309, 320; Buckler *v.* City of Newman (1904) 116 Ill. App. 546; Knightstown *v.* Musgrove (1888) 116 Ind. 121.